IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 5522/2011

In the matter between:

MERCEDES BENZ FINANCIAL SERVICES SOUTH AFRICA (PROPRIETARY) LIMITED	Applicant (Plaintiff)
and	
DIRK ARNO COETZEE	Respondent (Defendant)

J U D G M E N T: 12 MAY 2011

Weinkove A.J.

1. In this matter, Applicant (as Plaintiff) seeks an order for summary judgment against Respondent (as Defendant) for an order authorising it to dispose of the Mercedes Benz motor vehicle which forms the subject matter of the main action. Applicant also seeks an order authorising it to retain payments already made and certain other relief.

2. This action is opposed by Respondent and an affidavit opposing summary judgment has been filed.

3. Respondent raises two defences.

In the first place Respondent avers that Applicant is not the owner of the motor vehicle which is the subject matter of this transaction and has not established such claim of ownership.

In the second instance Respondent contends that the agreement concluded between Applicant and himself had not been properly cancelled in terms of the provisions of the National Credit Act. In this regard, it is Respondent's case that inasmuch as the previous action brought by Applicant against Respondent on the same subject matter was withdrawn, Applicant cannot rely on that summons as constituting an act of cancellation.

Respondent also raises the defence that he did not receive a section 129 notice and that he referred his indebtedness in respect of the written agreement to a debt counsellor at a time when the cancellation alleged by Applicant was no longer in force.

4. Insofar as the question of ownership of the motor vehicle is concerned, it is uncontested that Respondent purchased the motor vehicle from Malmesbury Motors and took delivery thereof some 2 months before the agreement which Applicant is relying upon was signed by the parties. Respondent's case is that the motor vehicle was owned at the time by Malmesbury Motors, alternatively himself (in terms of a credit sale agreement). Respondent contends that no facts are alleged, nor is any pleading filed, to explain how Applicant can become the owner of a motor vehicle which had already been delivered to him some 2 months prior to the instalment sale in respect of the vehicle being signed by the parties.

This defence is clearly pleaded in previous litigation between the parties and is fully and properly set out in the opposing affidavit. Respondent goes even further to demonstrate that there are no facts or allegations in support of a contention that there was no constructive delivery of the motor vehicle either in terms of some tripartite agreement or some special agreement in regard to converting Respondent's possession of the motor vehicle into an agreement of transfer by him to Applicant.

5. What seems to me to be clear is that at the time the agreement was signed, Respondent was already in possession of the motor vehicle and had been in possession thereof pursuant to some agreement concluded between himself and Malmesbury Motors. Applicant was no party to that agreement *ex facie* the documents that had been filed or the allegations that are made in the pleadings.

6. As far as the question of cancellation is concerned, Respondent has consistently denied that cancellation of the agreement was effected by Applicant and has invited the Court to have regard to the pleadings in this matter and in the action which was previously withdrawn. Furthermore, Respondent, in terms, denies receipt of the section 129 notice in terms of the National Credit Act. Respondent also relies upon Applicant's failure to oppose the debt rearrangement application brought by him which it would have been entitled to do if the agreement had already at that stage been cancelled.

7. As far as the written agreement is concerned, I must record that it consists of 6 pages and is printed in fine print. The document has to some extent not been legibly copied, but I expect it will be transcribed before the trial is heard. Every page of the agreement is over-stamped with the name "Malmesbury Motors" and it is not clear what the significance of this over-stamping is. It may even be a reference to the fact that the vehicle remains the property of Malmesbury Motors notwithstanding the terms of the agreement.

8. Counsel for Applicant draws my attention to clause 19 on page 14 of the Record, which records that if Respondent chooses to pay off the debt, then the motor vehicle will at all times belong to Applicant and will not be transferred to him as owner until all amounts owing in terms of the agreement have been paid. This is a meaningless clause in the light of the fact that at the stage when this agreement was concluded, the motor vehicle could not have belonged to Applicant but would have still been the property of Malmesbury Motors, alternatively Respondent.

9. I am also referred to page 15 of the bundle, clauses 34.2 and 34.3, which records that Respondent is obliged to take delivery of the motor vehicle at his own cost from the supplier and that when he does so he will be deemed to have agreed that he is taking delivery of the vehicle on behalf of Applicant and that he is doing so as an agent on behalf of Applicant and purely to invest Applicant with ownership of the vehicle.

10. This clause also can be of no force or effect because at the stage when the document was signed, as I previously indicated, Respondent was already in possession of the motor vehicle, so that there was no question of him taking delivery thereof as agent for Applicant so as to invest Applicant with ownership in the vehicle.

11. On the question of the probabilities, Applicant also alleges that Respondent insured the vehicle and endorsed Applicant's interest in the vehicle on the policy of insurance. That policy of insurance is not included in these papers and my only observation in this regard is if in fact such interest was endorsed whether it existed in law or fact or not cannot assist Applicant in proving ownership of the vehicle.

12. Applicant also relies upon the judgment of Acting Justice Katz in this matter where Applicant sought to obtain an order for possession of the motor vehicle pending the action for payment. That judgment by Katz AJ, as Respondent points out, merely recorded a *prima facie* ruling in respect of the interim situation concerning the possession of the Mercedez Benz motor vehicle. I do not consider that this proves applicant's ownership of the vehicle.

13. The most important aspect of this matter is that Respondent has had possession of the motor vehicle for a period of more than 2 months prior to the execution of the agreement. The purchase price of the vehicle was R378 000.00 and Respondent has to date paid R78 000.00 of that

purchase price but remains indebted, according to Applicant, for a further R561 453.00.

14. Respondent has consistently challenged Applicant's allegation that it is the owner of the motor vehicle. It is not suggested that Respondent purchased the vehicle from Applicant and it seems common cause that it was purchased from Malmesbury Motors.

15. There have been two actions between the parties to date on this agreement since 2008. Both of these actions were withdrawn by Applicant and there is no explanation placed before the Court or is apparent from the pleadings why this was so.

16. It could be that Applicant took over the debt owed by Respondent to Malmesbury Motors and arranged to collect the monies owing in terms of the original sale by Malmesbury Motors to Respondent by entering into the written agreement annexed to the pleadings. The present action is primarily designed at affording Applicant the right to now sell the motor vehicle, having successfully obtained repossession thereof before Katz AJ. This Court has no idea how that sale is to be structured and whether there is any certainty that such sale will be conducted so as to realise a reasonable market value for the vehicle.

17. To decide this matter it is necessary for this Court to decide whether to give Respondent leave to defend these proceedings and to do so the

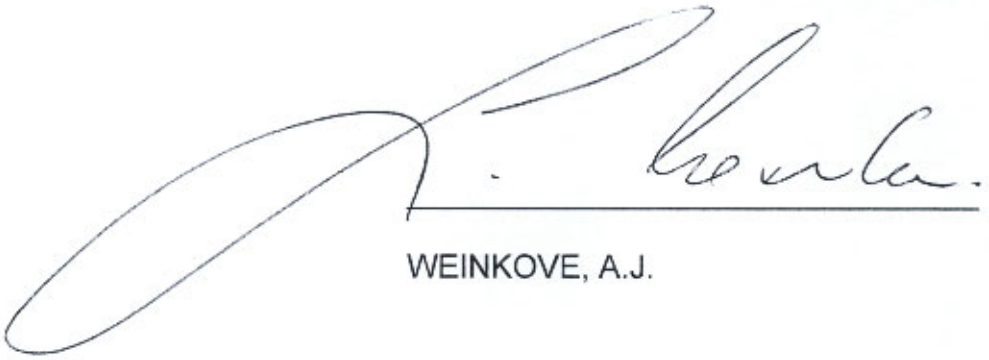
Court must be satisfied that Respondent has a *bona fide* defence to the action and whether he has fully disclosed the nature and grounds of that defence and the material facts relied upon therefor.

18. The cases indicate that the Court must consider whether there is a "triable issue" or a "sustainable defence". If so, the Court should not deprive Respondent of the right to put that defence before the Court. The standard of detail that is required is that the Court should be satisfied that there is a fairly arguable defence being brought forward. Otherwise stated, that there is a "fair issue to be tried". If that is so, Respondent should be given leave to defend. A Court should not attempt to decide the issues or determine whether or not there is a balance of probabilities in favour of one party or the other. All that the Court should do is determine whether Respondent has fully disclosed the nature and grounds of his defence and the material facts upon which it is founded. The Court should then decide on the facts so disclosed whether Respondent appears to have a defence which is *bona fide* and good in law.

19. Applying these principles as I do, I come to the conclusion that Respondent does have a *bona fide* defence which, if proved, would be good in law. Respondent has consistently put up this defence and has consistently challenged Applicant's allegations that it is the owner of the motor vehicle concerned. The high-water mark of Applicant's defence to this challenge is to rely upon the terms of the written agreement. I have dealt with the passages in the written agreement to which my attention

has been drawn. These passages do not support Applicant's claim to ownership of the motor vehicle in circumstances where the vehicle had already been delivered by the seller to Respondent some 2 months before the execution of the agreement. In the result, I consider that Respondent has made out a *bona fide* and arguable defence and should be given leave to defend.

20. In the circumstances, the application for summary judgment is dismissed, with costs.



WEINKOVE, A.J.